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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

BRIAN E. CLAYPOOL,

Plaintiff and Appellant,

v.

ROBERT J. ROGERS,

Defendant and Respondent.

B162231

(Los Angeles County Super. Ct.
No. BC248095)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Susan Bryant-Deason, Judge, and Edward Kakita, Retired Judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution. Affirmed.

The Claypool Law Firm, Brian E. Claypool, in pro. per., and Kathleen E. Wilcox for Plaintiff and Appellant.

Moore, Winter, Skebba & McLennan and Matthew R. Rungaitis for Defendant and Respondent.

Plaintiff and appellant Brian Claypool appeals from a judgment of nonsuit entered in favor of defendant and respondent Robert Rogers, M.D., an anesthesiologist, in this medical malpractice action. Nonsuit was entered because plaintiff's expert anesthesiologist witness had been excluded due to discovery violations. Plaintiff contends the trial court abused its discretion when it excluded his expert witness. We affirm.

FACTS AND PROCEDURAL BACKGROUND

Plaintiff's nose was injured playing basketball. On April 5, 2000, plaintiff underwent nasal surgery under general anesthesia; Dr. Rogers was the anesthesiologist during the surgery. Shortly after the surgery, plaintiff discovered that two of his teeth were injured. Plaintiff believed Dr. Rogers had caused the injury to his teeth by intubation and extubation during the surgery.

Plaintiff is a trial lawyer with his own law firm. On April 4, 2001, plaintiff, represented by his own law firm, filed a complaint for medical negligence against Dr. Rogers. After demurrer proceedings, a third amended complaint was filed. Dr. Rogers answered the third amended complaint on September 10, 2001. Discovery was delayed until February 2002, due to the illness of plaintiff. After he recovered, plaintiff did not appear for a scheduled mediation or a status conference, and the trial court imposed sanctions. Plaintiff also did not comply with discovery requests until after motions to compel had been filed and the trial court had ordered compliance and imposed sanctions.

Trial was scheduled for May 22, 2002. On April 19, 2002, plaintiff moved ex parte to continue the trial date and the discovery cut-off dates. The motion was based on the inability of plaintiff to conduct the deposition of Dr. Rogers. Trial was continued to July 17, 2002, and discovery cut-off dates were extended to correspond to the new trial date.

On May 28, 2002, plaintiff designated Ronald Katz, M.D., as his expert anesthesiologist.

On July 2, 2002, plaintiff again moved ex parte for a continuance of the trial date and the discovery cut-off dates. Plaintiff's deposition had been taken, but Dr. Roger's deposition had not yet been taken. Depositions of defense experts were pending. The motion was denied. On July 8, 2002, plaintiff again moved ex parte for a continuance of the trial and the discovery cut-off dates. The trial date was continued to July 24, 2002, but the discovery cut-off dates were not extended. The trial court noted plaintiff's lack of diligence in pursuing discovery. The trial court also noted that a previous two-month continuance had been granted to plaintiff and little or no discovery had been completed.

On July 16, 2002, the defense objected to Dr. Katz testifying as an expert witness for plaintiff, because Dr. Katz had never been produced for deposition. On July 23, 2002, the defense moved to exclude the expert testimony of Dr. Katz. The deposition of Dr. Katz had originally been scheduled for June 21, 2002. However, plaintiff had cancelled the deposition date and rescheduled it for June 28, 2002. Dr. Katz had been served on June 13, 2002, with a deposition date of June 28, 2002, a date mutually agreed by the parties. On June 26, 2002, plaintiff called to say the deposition would not go forward. No new date was ever scheduled, despite defense counsel's June 27, 2002 request for a new deposition date prior to July 5, 2002. Defense counsel also attempted several times by telephone to reschedule the deposition of Dr. Katz.

Plaintiff opposed the motion, asserting that no depositions could go forward by order of the court after July 8, 2002. Plaintiff also took the position the date for Dr. Katz's deposition had been unilaterally selected by the defense and not jointly selected. Plaintiff also asserted that the associate who was to take the deposition had been ill.

On July 23, 2002, the trial court excluded the expert testimony of Dr. Katz. The trial court denied plaintiff's oral request to exclude defense experts.

After plaintiff's opening statement and concession he had no expert anesthesiologist witness, the defense moved for nonsuit, arguing plaintiff could not

establish a breach of the standard of care. The defense motion for nonsuit was granted on July 25, 2002, and judgment for the defense was entered on August 14, 2002. This timely appeal followed.

DISCUSSION

Plaintiff does not argue that nonsuit was improperly granted. He concedes that the absence of an expert witness defeated his case. He argues that the trial court improperly excluded his expert witness. Plaintiff's argument is based on Code of Civil Procedure section 473. This argument is completely without merit. First, plaintiff never made a motion for relief from default under Code of Civil Procedure section 473. Second, Code of Civil Procedure section 473 is inapplicable to discovery proceedings. The proper argument is whether the trial court abused its discretion when it refused to further extend the discovery cut-off date and subsequently excluded plaintiff's expert witness for failure to make the witness available for deposition. We conclude there was no abuse of discretion.

As a general rule, discovery is to be completed 30 days prior to the initial trial date; discovery motions are to be heard 15 days prior to the initial trial date. (Code Civ. Proc., § 2024, subd. (a).) Discovery is considered completed as to a deposition on the date the deposition begins. (*Ibid.*) Unless the court orders otherwise, a continuance of the trial date does not operate to reopen discovery proceedings. (*Ibid.*)

Code of Civil Procedure section 2034 provides for the exchange of expert witness lists by the parties. The opposing party is entitled to take the deposition of any expert witness on a party's expert witness list. (Code Civ. Proc., § 2034, subd. (i).) Discovery pertaining to witnesses designated as experts is to be completed 15 days prior to the trial date; discovery motions concerning these expert witnesses are to be heard 10 days prior to the trial date. (*Id.*, § 2024, subd. (d).) The trial court shall exclude the expert opinion of a witness who has not been made available for deposition. (*Id.*, § 2034, subd. (j).)

The trial court has discretion to permit completion of discovery or to reopen discovery. (Code Civ. Proc., § 2024, subd. (e).) In exercising this discretion, the trial court should consider: the necessity and the reasons for the discovery; the diligence or lack of diligence of the party seeking discovery and the reasons the discovery was not timely completed; the effect of the extension on the trial date or any prejudice to the opposing party; and the length of the time between the previous trial date and the new trial date. (*Ibid.*)

Plaintiff designated Dr. Katz as an expert witness on May 28, 2002. At this time, trial was scheduled for July 17, 2002, and the discovery cut-off dates corresponded to this trial date. The defense properly noticed the deposition of Dr. Katz for June 28, 2002. Although plaintiff disputes this, the date of June 28, 2002, had been mutually agreed by the parties. Thereafter, plaintiff vacated the noticed deposition date and never proffered any additional dates prior to July 5, 2002. Thus, plaintiff unreasonably failed to make Dr. Katz available for deposition within the discovery cut-off period, and the trial court properly excluded Dr. Katz as an expert witness.

To the extent plaintiff argues the trial court abused its discretion when it refused to extend the discovery cut-off dates in July, we conclude there was no abuse of discretion. The record reflects that plaintiff had been dilatory throughout the life of the case. Failures to appear, failures to comply with discovery requests, and unilateral vacations of scheduled deposition dates figure prominently in the record. Plaintiff had already been granted a two-month continuance of the trial date and discovery cut-off in order to complete discovery. During this period of time, plaintiff completed virtually no discovery. The trial court could properly find that the discovery failures were the fault of plaintiff.

Plaintiff's argument concerning the trial court's cut-off of discovery after July 8, 2002, is irrelevant, because that date was already after the discovery cut-off date. In addition, plaintiff's arguments concerning defense experts is irrelevant because nonsuit was granted after plaintiff's opening statement. Finally, the trial court excluded the

deposition testimony of plaintiff's witness whose deposition was taken by the defense after the discovery cut-off.

DISPOSITION

The judgment is affirmed. Defendant is awarded his costs on appeal.

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GRIGNON, Acting P. J.

We concur:

ARMSTRONG, J.

MOSK, J.